No. 15,619

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

MARY TROUTFELT COHEN,
Appellee,

and

MARY TROUTFELT COHEN,
Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellee.

APPELLANT'S REPLY BRIEF.

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INTRODUCTION.

Despite Appellee's attempt to becloud this case with diversionary arguments, it is nonetheless clear that one basic issue pervades and governs the entire controversy. That issue is, simply: What was the agreement actually entered into by the two contracting parties.

Appellant's case consists of a demonstration of what that agreement really was plus an explanation of the two alternative routes which were available and should have been utilized by the trial Court to give effect to that agreement. Appellee's case consists of a writing which Appellee asserts is the embodiment of the agreement, but which contains within itself a discrepancy that neutralizes its effect. This simple truth should be recalled as the Court considers each of the various obstructions thrown up by Appellee in an effort to prevent the true contract from being enforced.

ARGUMENT.

I. APPELLEE'S TRANSPOSITION OF THE ANTICIPATORY BREACH PROBLEM TO THE END OF HER BRIEF DOES NOT IN THE LEAST ALTER ITS IMPORTANCE OR ALLOW HER TO SLUFF OFF THE TRIAL COURT'S ERROR. THE LAW IS CLEAR THAT THE DOCTRINE OF ANTICIPATORY BREACH CANNOT BE APPLIED IN A CASE LIKE OURS WHERE THE CONTRACT HAD BECOME UNILATERAL IN PERFORMANCE, ALL CONTINGENCIES HAD BECOME RESOLVED, AND ONLY INSTALLMENT PAYMENTS OF MONEY REMAINED TO BE PERFORMED. THE TRIAL COURT, THEREFORE, HAD NO AUTHORITY TO INCLUDE IN ITS JUDGMENT THOSE INSTALLMENTS WHICH WERE NOT YET DUE OR OWING TO PLAINTIFF.

Appellee does not dispute the facts relevant to this issue. Thus, Appellee concedes that the only obligation which remains under this contract—*if there be any obligation*—is the obligation of the insurance company to pay money in installments. There is no performance called for by plaintiff. There remain no

contingencies or conditions which will affect the amount or the time of payments. All risk elements of the normal insurance or annuity contract have disappeared. The contract has been transformed by previous event into a simple contract for the payment of money in installments for consideration already paid.

Under such circumstances, the doctrine of anticipatory breach cannot be applied. And Appellee has failed to refute this point.

Thus, the *Restatement of Contracts* clearly states that the doctrine of anticipatory breach is unavailable here (See Section 318, and particularly Comment e). Williston likewise recognizes this as the prevailing rule of law *(Williston on Contracts,* Rev. Ed. § 1328), as does *Federal Law of Contracts,* §§ 446, 449. See also, 12 *Am. Jur.* Contracts, § 394.

Thus, in *Cobb v. Pacific Mutual Life Ins. Co.,* 4 Cal. 2d 565, 51 P. 2d 84, the California Supreme Court states at page 573:

> "There can be no anticipatory breach of a unilateral contract. (Williston on Contracts, vol. III, § 1328.) In volume 1, Restatement of Contracts, California Annotations, section 318, the rule is thus stated: 'In unilateral contract for payment in installments after default of one or more no repudiation can amount to an anticipatory breach of the rest of the installments not yet due.' (Citing a list of California decisions.) *It is also the law that a bilateral contract becomes unilateral when the promisee has fully performed.* In the case at bar the promisee had fully per-

> formed. He was exempt from future performance so far as dues or assessments were concerned. The fact that he was required or requested to submit to reasonable future medical examinations or furnish an occasional health report is too trivial and inconsequential to be regarded as an unperformed obligation on the part of the insured. He was therefore within the exception stated in the rule which holds *that no repudiation can amount to an anticipatory breach of the rest of the installments not yet due.*" (Emphasis added.)

The same rule of law is stated and relied upon in *Brix v. People's Mutual Life Ins. Co.,* 2 Cal. 2d 446, 453, 41 P. 2d 537, and the numerous cases cited therein.

Appellee has failed completely to establish the inapplicability of this rule of law.

First, Appellee vainly attempts to limit the applicability of the *Cobb* and *Brix* cases, supra, to disability insurance cases. But the decisions plainly approve and adopt the rule quoted above.

Second, Appellee falsely asserts that the *Caminetti* case, 23 Cal. 2d 94, is a *life* insurance case, and therefore differs from the *Cobb* and *Brix* cases. But the most cursory reading of the *Caminetti* case shows that it involved *disability* insurance.

Third, Appellee ignores the entire purpose and expressly stated reason for the holding in the *Caminetti* case. For the Court expressly pointed out that it was

allowing full recovery against the insurance company because it was *insolvent* and in the *process of liquidation*. It characterized the insolvency situation as being *analogous* to a breach by anticipatory repudiation. It then said that unlike the *Cobb* and *Brix* cases, supra, the *Caminetti* case involved the issue of damages for "total repudiation . . . where it is *beyond the power of the insurer to respond in the future for future damages*." (23 Cal. 2d 94, 104.) In short, the interests of justice demanded that plaintiff be made secure because of a special fact—insolvency. And the Court went on to say at 23 Cal. 2d 110:

> "For the foregoing reasons we believe that the measure of damages adopted by the commissioner is the correct measure of the amount to be allowed *disability* policyholders of the character involved *where the insurer becomes insolvent. We do not express any views with respect to the proper measure to be used in life* or disability policies where the insurer has repudiated a policy but is not prevented by insolvency from being *compelled to continue the insurance*." (Emphasis added.)

Next, Appellee attempts reliance on the case of *Guitron v. Rodriguez*, 105 Cal. App. 513, 288 Pac. 134. However, that case does not discuss the question of anticipatory breach. It cites no cases as authority for its holding. It relies on a section of *California Jurisprudence* which makes no mention of anticipatory breach. It was decided in the District Court of Appeal and before the California Supreme Court cases we have discussed. And it most assuredly did not

involve life insurance, disability insurance, or any other kind of insurance contract.

Finally, Appellee quotes *in part* from *Corbin on Contracts*. However, Corbin concedes, in the section which is neither quoted nor mentioned by Appellee—4 *Corbin on Contracts* § 963—that the cases are contrary to his view!

The universally accepted rule, which refuses to apply the doctrine of anticipatory breach to contracts for the payment of money in installments that have become unilateral in performance, has been approved by the Supreme Court of the United States. *Smyth v. U. S.,* 302 U.S. 329, 59 S. Ct. 248; *Roehm v. Horst,* 178 U.S. 1, 20 S. Ct. 780. The *Smyth* case involved the obligation to pay money periodically on certain United States bonds. The United States Supreme Court observed as follows, citing as authority the *Restatement of Contracts* and *Williston:*

> But the rule of law is settled that the doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to such contracts for the payment of money only.

Again, in *City of Hampton v. U. S.,* 218 F. 2d 401 (4th Cir. 1954), an award like that in the present case was involved. The contract in that case was for the borrowing of money, and provided that it should be repaid in 40 equal annual installments. The money was loaned, and the obligation to repay was subsequently repudiated. The creditor brought suit and was given judgment by the trial Court for the full amount

of the debt. On appeal, the judgment was modified by excluding therefrom the payments that had not become due and owing under the terms of the contract. The Court of Appeals reasoned as follows (p. 405):

> As the contract had been fully performed on the part of the United States and all that remained to be done under the contract was the payment of money in instalments by the City, recovery of instalments past due would give plaintiff the full measure of reparation to which it was entitled at the time of the institution of suit. (Citing authority.) Whatever be the rule with respect to other contracts, it is clear, under the authorities, that for breach of a contract for the payment of money in instalments, where the contract is unilateral or has become unilateral as the result of performance by the complaining party, the right of recovery is limited to the instalments due at the time of institution of suit. (Citing authority.) Of course, the effect of a judgment for the past due instalments is to establish the liability of defendant under the contract, as fully as if this were done by declaratory judgment; and on the principle of res judicata this will facilitate recovery on other instalments as they fall due.
>
> . . . But the Government had no right under the law to recover the total sum of $27,500 because, as we have seen, the contract, which was originally bilateral, had become unilateral by full performance on the Government's side, leaving only the re-payment by the City in instalments of the money advanced by the Government.

It is submitted that this case provides an exact holdin on all of the pertinent facts of the present controversy.

The law of New Mexico is controlling on all substantive issues in this case, as is conceded by appellee. (Brief, p. 15 ff.) Although no New Mexico decision on this point can be found, it would be presumptuous indeed to assume that New Mexico law would be in any way contra to the universally accepted rule. Rather, it must be presumed that New Mexico law is in accordance with the great bulk of the established law in other jurisdictions, and that New Mexico would not apply the doctrine of anticipatory breach to a situation involving a unilateral obligation for the payment of money in installments.

The accepted rule, which refuses to apply the doctrine of anticipatory breach in our situation, gives to the Appellee the fullest protection of the Court and a complete performance of the contract obligations. There is no question of a need to relieve Appellee from future obligations on her part. She does not have to hold herself in readiness to perform anything, for all of her obligations have already been performed. No prejudice of any kind can result to her from thus holding the contract open and enforcing it by its terms. No need or justice appears in accelerating the payments provided for by the contract. Only those contract payments due and owing should have been awarded by the trial Court.

II. AT THE VERY LEAST THERE MUST BE COMMUTATION OF THOSE SUMS NOT DUE UNTIL A FUTURE DATE.

Even should the doctrine of anticipatory breach be held applicable to our case, the judgment is still incorrect. The trial Court neglected to discount the time factor in computing the amount of the judgment. For no one will contend that $50.00 in hand today is the equivalent of $50.00 not in hand until two years from today. Yet this was the holding of the Court below. It conclusions of law read as follows (R 106):

> . . . defendant was obligated to pay to plaintiff $50 on the first day of each month after the death of said Troutfelt in 1945 to and including, February 1, 1959, and thereupon to pay her the further sum of $5000, and upon defendant's refusal to perform said contract and its anticipatory breach thereof, plaintiff became entitled to recover said sums totaling $8,000 together with interest on delinquent monthly payments . . .

It is disclosed in the judgment that the first date for a monthly payment was March 1, 1954. There were thus 60 monthly payments of $50.00 comprehended in the judgment. These were taken at their full value to produce the sum of $3000.00, which was added to the further sum of $5000.00 to produce the basic judgment amount of $8000.00.

But this manifestly was error. There was no provision in the contract calling for an acceleration of payments, nor is there any principle of law which would produce this result. If as the Appellee contends judgment is to be given for the full amount of the

obligation remaining, including those monthly payments not yet due, and including the sum of $5000.00 which will not become due until February 1, 1959, *then only the present value of these future payments can properly be awarded to plaintiff.* The time element involved in the case simply cannot be ignored. To do otherwise is to violate the principle that damages are intended to be compensatory only. 25 *C.J.S.* § 74, p. 567; 15 *Am. Jur.* § 26, pp. 419-420; anno., 77 *A.L.R.* 1439, 90 *A.L.R.* 1318, 105 *A.L.R.* 234.

Indeed, the necessity of commutation in this precise type of case is apparent from the very few cases erroneously employing the doctrine of anticipatory breach to contracts for the payment of money in installments. Such a case is *Commercial Travelers Casualty Co. v. Dymke,* 279 S.W. 2d 405 (Tex. 1955). The Court in that case awarded to plaintiff a judgment for 15 months payments under a disability insurance contract, applying the minority view utilized by Texas Courts, but in doing so observed as follows (p. 408):

> However, the eleven monthly payments which had not accrued when the judgment was rendered should have been discounted at the rate of six per centum per annum from the time they would otherwise have been payable to the date of the judgment. Pan American Life Ins. Co. v. Garrett, Tex. Civ. App., 199 S.W. 2d 819.

A reading of the cited case indicates that the six per centum figure was chosen because that is the legal rate of interest in Texas.

California law also is in accord on the commutation point save only that the legal rate of interest in California is seven per cent instead of six. *Noble v. Tweedy,* 90 C.A. 2d 738, 747-748, 203 P. 2d 778.

And there is no dispute as to this Court's ability to remedy the error. For where an error of law has resulted in an incorrect computation of the judgment, the reviewing Court can make the proper computation and modify the judgment. *Feckenscher v. Gamble,* 12 Cal. 2d 482, 500; *Parnham v. Parnham,* 32 C.A. 2d 93, 98; *St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Assn.,* 93 F. 2d 590 (10th Cir. 1938); *Phillips & Benjamin Co. v. Ratner,* 206 F. 2d 372 (2nd Cir. 1953).

Therefore, even if the trial Court had committed no error in applying the doctrine of anticipatory breach, and rendering judgment for future as well as presently owing payments of money, it still was and is required to commute all payments due subsequent to the date of judgment (March 20, 1957) to their present value.

III. APPELLEE ATTEMPTS TO STRIP THE ISSUES ON THIS APPEAL FROM THE REVIEWING COURT BY RELYING UPON THE RULE THAT QUESTIONS OF FACT ARE FOR THE TRIAL COURT. BUT THE ESSENTIAL FACTS HERE COME FROM UNDISPUTED DOCUMENTARY EVIDENCE AND FROM UNCONTRADICTED TESTIMONY. HENCE THE RULE IS INAPPLICABLE.

A. The evidence.

A review of the evidence demonstrates that with one exception it is entirely documentary, and that both

the documentary and testimonial evidence is uncontroverted by Appellee, and that there is no conflict as to the evidence. The bulk of this evidence is provided by the insurance policy itself, a document with *several* component parts. There are also in evidence the records kept by the insurance company relating to this policy. Finally, there is testimony identifying, explaining and establishing the chronology of these documents and the entries therein, given by the very person who was in charge of the company office that processed this insurance policy. This evidence reveals that on February 1, 1939, plaintiff's husband applied for a 20 payment life insurance policy with a 20 year family income rider. (R. 64.) A few months later, on May 31, 1939, he applied for a converted policy, requesting a change be made to a 15 year endowment-family income policy. (R. 63.) The company then sent to him their regular family income application form, with his name, the number "15" in as the term of the family income provision and the number "10" in as the number of years premiums would be payable *already typed in.* This fact was provided by the testimony of the witness Lawton (R. 172-173), the individual who supervised the processing of the policy in question. (R. 157-158, 161-162.) After this, on July 11, 1939, the 15 year family income application was signed by the insured and returned to Lawton's office. (R. 173.) This application, as well as the one that preceded it, *both* specified 15 years as the term of the family income provision. *Both were physically attached to and made a part of the insurance policy.* (R. 37.) The

premium for the policy was set out and broken down into component's right on the face of the policy. (R. 33.) The amount of the premium for the family income provision was shown on the face of the policy to be $43.20, the correct amount for a fifteen year family income provision. (R. 33.) The amount of the premium set out on the face of the original policy, the one calling for a *20* year family income provision, had been $52.95. (R. 66.) Both of these figures were on the *face* of their respective policies, in the most conspicuous place available, so that they *could be seen without even removing the policy from its envelope.* (R. 166-167.) It was also shown that the insurance company does not retain carbon copies of the standard printed form portion of the policies which it issues, but maintains its records by use of the application portion of the policy instead. (R. 177-178.) Thus the insurance company did not have access to the standard printed form except on two subsequent occasions; the first in 1945 when the insured died and the policy was sent to the home office and stamped for settling (R. 103, F. 10); the second occasion was when this dispute arose.

This then is the evidence in the present case. There was offered no conflicting documentary evidence and no conflicting testimony by Appellee. Indeed there is no conflict in the evidence, no dispute as to the relevant facts, *as conceded by Appellee at the trial.* (R. 154.) The only remaining questions are the legal effect and significance to be given to these undisputed facts, and the legal principles which will govern the

remedies sought by Appellant and Appellee respectively. In such a situation the role of the Appellate Court is in no way stilted by the restrictive rule of review relied on by Appellee.

B. The controlling legal issue—intent.

The controlling issue in this case, regardless of the means by which it is approached, is what was the mutual intent of the contracting parties. Whether the Court chooses to work through the medium of reformation or through the medium of construction, this issue is primarily the same; namely, what was the agreement on which the contracting parties came to a meeting of the minds. The dispute in the present case involves one term of the contract only. That term is the number of years that payment should be made under the family income provision of the contract. Appellant contends and the evidence shows without contradiction that the parties agreed on 15 years. Appellee contends that this term is properly represented by the number "20." *Both* figures appear upon the face of the policy; and although the trial Court found in favor of Appellee, this finding must now be reversed in light of the uncontradicted evidence.

C. Appellant's case.

In support of its position that the mutual intent of the parties was to insert in the disputed provision the number "15" Appellant points to the following evidence: The insured on May 31, 1939, in the very first correspondence pertaining to the converted policy, sent to the insurance company a document re-

questing that his 20 year insurance coverage be changed to 15 year insurance. In this document, signed by the insured, under the heading "Specifications for New Policy," there was inserted the words "**15** Yr. End.-F.I. Provision," wherein "End." stands obviously for Endowment and "F.I." stands obviously for Family Income. Still later, the company's regular application form was sent to the insured by the company, *after* the company had typed thereon the number "**15**" in the space provided for term of the supplementary provision. The number "15" was obviously taken from the previous document, in compliance with the instructions of the insured as to the type policy he wished to have. The insured *then* signed this second document on July 11, 1939, and returned it to the company. This passing back and forth of correspondence not only demonstrates in the strongest way just what the intention of the parties was in regard to the term of the family income provision, but it also served to *focus their attention* on the very part of the contract that Appellee has sought to defeat. The formal policy was then issued by the insurance company and the number "20" was inadvertently inserted in *one portion* of the policy as the term of the family income provision. However, the other two documents just mentioned were physically attached to the policy and incorporated therein *by express reference.* This *entire* document was then sent to the insured.

D. Appellee's case.

Contrasted with the detailed proof set out above, Appellee (and the trial Court) rests his case on one point only: the presence of the number "20" as the term of the family income provision on *one portion* of the insurance policy. Appellee asserts that the "policy" itself specified the 20 year term. But this, as we have seen, is at best a half truth. The term provision appears in *three* places throughout the policy; in one of these it is represented as "20" years, *but in two of these places it is represented as "15" years.* Appellee therefore can hardly expect to support her position through the policy itself.

The insurance policy in this case is a composite document. In addition to the basic endowment feature, it contains a disability rider, a double indemnity rider, a family income rider, the original application for insurance of February 1, 1939, the original application for a family income rider of the same date, the application for a converted policy of May 31, 1939, and the family income application in respect of this policy, dated July 11, 1939. All of these parts were physically affixed to each other and constituted in fact and in law one entire policy or contract. Thus, it is stated on page one of the document that *"This policy and the application herefor constitute the entire contract between the parties . . ."* Appellee can therefore not lay claim to the support of the "policy." Appellee is attempting to extract one fraction of a composite whole and set it up as determinative of the

whole. But the absurdity of this effort is apparent from the contradictions contained within the policy itself. And it is for this reason that Appellant is entitled to and relies most heavily on the preliminary correspondence, which was focused on this disputed provision, as showing the objective manifestations of the true intent of the parties.

Appellee attempts to bolster her case by an alleged inference that the insured did not intend to reduce his wife's protection from the 20 year period in the original policy to the 15 year period of the converted policy. (Brief of Plaintiff as Appellee, p. 8.) We are enjoined that all reasonable inferences in support of the judgment below must be drawn. But it is submitted that such an inference is entirely unreasonable and contrary to proven facts. Such an inference is not only unreasonable but impossible in view of the May 31, application for a "**15** Yr. End.-F.I. Provision" *and* of the July 11 application which was preceded by correspondence culminating in the insertion of the 15 years in an application and its later execution by Troutfelt.

Appellee suggests that the number 15 might have been inserted in the application of July 11 after this application had been returned to the company. (Brief, p. 7). Appellee asks this Court to presume and asserts that this Court is bound to presume that the trial Court disbelieved the witness Lawton who testified to the contrary. For this extreme proposition, Appellee relies on R.C.P. Rule 52 and several cases applying that rule. Rule 52 merely provides that

"due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses." But this is a far cry from what Appellee urges upon us here. The cases of *Hayes v. First Nat. Bank of Fairbanks,* 192 F.2d 393; *Sun Life Assur. Co. of Canada v. Stacks,* 187 F.2d 17; *Standard Oil Co. v. Moore,* 9 Cir., No. 14,927, Nov. 6, 1957, cited by Appellee, all involved situations where the evidence was in *conflict,* either because two witnesses testified to opposite and mutually exclusive facts or because the testimony of a witness was inconsistent with other established facts in these cases. In such a situation the trial Court obviously was compelled to consider conflicting evidence.

In contrast to this situation, the testimony of the witness Lawton was not contradicted by any other testimony. It was not inconsistent with the established facts of this case, but on the contrary, is substantiated by undisputed and documentary evidence. There is first the fact of the application of May 31, specifying a change to a "15 Yr. End.-F. I. Provision." There is secondly the fact of the two applications for the converted policy, for which no other explanation is possible. In addition to this support from the other evidence, the witness Lawton possessed the highest qualifications as a witness in his own right. He was in charge of the office which processed this application. His testimony was based on recollection, supported by past experience and by regular entries in business files. (R. 161-162, 189.) There is simply no basis for disbelieving him. His testimony was un-

controverted by testimony or any other evidence, and was fully borne out by independent documentary evidence in the case. In this situation, the correct rule is just the opposite from that urged by Appellee. As stated by the Court in *U. S. v. Johnson,* 208 F. 2d 729, 730 (5th Cir. 1953):

> The evidence of the witness Jones . . . was unimpeached and uncontradicted, and its credibility was in no manner brought into question. This being so, the district judge could not reject his testimony or find contrary thereto.

Of course, this whole issue of credibility is based on a mere assumption of Appellee. We do not for a minute believe that the trial Court disbelieved the witness. *There is no indication in the findings or the opinion that the Court at any point questioned the witness's testimony.* We must therefore regard as fully established the fact that the application of July 11 had previously been in the hands of the insurance company, where the number "15" was inserted as the term of the family income provision; that it was subsequently sent to the insured who completed filling it out and returned it to the company; and that the number "15" appeared on this document from start to finish as a clear indication of the intention of *both* of the contracting parties.

E. The applicable rules of review.

Appellee would ask this Court to ignore the substantive issues of this case because of the fact that the trial Court made findings of fact. He relies on the

familiar rule that findings of fact are binding on the Appellate Court if they are supported by the evidence. Appellant submits, however, that the findings of fact regarding the mutual intent of the parties *are not supported* by the evidence in this case, and that as a matter of law such findings must be overturned. This would follow from the fact that the only evidentiary support for the findings is the appearance in one part of the policy of the numeral "20", and that this support is completely neutralized by the appearance in two other parts of the policy of the numeral "15". In contrast to this, is the detailed correspondence relied upon by Appellant to show that the intended term was "15".

But in addition to this, the rule of review cited above is not applicable to the situation presented by this case. Rather, a much less strict rule, one which gives far more discretion and latitude to the reviewing Court, is properly applicable here. That rule provides that where there are no contradictions in the evidence or where the facts are not disputed or where the evidence is substantially documentary, the reviewing Court is not bound by the findings of the trial Court. This proposition is set out and applied in *Fargo Glass & Paint Co. v. Globe American Corp.*, 201 F. 2d 534, 536 (7th Cir. 1953) as follows:

> Since the evidence material to the issues involved consists mainly of documents, depositions, answers to interrogatories and requests for admissions and oral testimony, which is almost entirely uncontroverted, the findings of fact entered

> by the District Court are not absolutely binding on this court.

A similar expression has been given in *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 178 F. 2d 541, 548 (9th Cir. 1949), in commenting as follows on R.C.P. Rule 52:

> "As a corollary to this rule, we may make our own inferences from undisputed facts or purely documentary evidence."

See also *Murphy v. U. S.,* 179 F. 2d 743 (9th Cir.); *Home Indemnity Co. v. Standard Accident Ins. Co.,* 167 F. 2d 919, 922-923 (9th Cir. 1948); *Western Union Tel. Co. v. Bromberg,* 143 F. 2d 288, 290 (9th Cir. 1944). The evidence in the present case clearly fits within the requirements of this rule of review. It is primarily documentary. There is oral testimony from one witness. Both the documentary and the testimonial evidence is uncontradicted by any other evidence. All items of the documentary and testimonial evidence are consistent with each other and derive mutual support from each other. There is no conflict in the facts or in the evidence offered in proof of those facts. Hence, the findings of the trial Court should not be considered binding on this Court, but instead this Court should exercise its own discretion.

IV. BASED ON THE FOREGOING SET OF FACTS, AND UNDER THE APPLICABLE NEW MEXICO LAW, APPELLANT HAS CLEARLY ESTABLISHED ALTERNATIVE GROUNDS ON WHICH RELIEF CAN PROPERLY BE GRANTED BY THIS COURT.

Appellee has conceded that New Mexico law must govern the substantive issues of this case. (Brief, p. 15.) A survey of New Mexico law reveals two theories which fit the facts of the present case and which afford to Appellant the relief which it seeks. These grounds for relief are first, construction of the contract and, second, reformation on the grounds of a scrivener's error.

A. Proper construction of the contract requires that the judgment be reversed.

Appellee concedes that relief can be given by way of construction of the contract. (Brief, pp. 11-12.) Appellee does not contest the applicability of the New Mexico case of *Franciscan Hotel Co. v. Albuquerque Hotel Co.,* 24 P. 2d 718, wherein construction was used to give effect to the real intent of the parties, relying on evidence of the same nature as the evidence presented by Appellant in the present case. Instead, Appellee again attempts to remove the issue from the scope of this appeal by arguing that the construction of the trial Court is binding on this Court, citing *Estate of Rule,* 25 C. 2d 1, 152 P. 2d 1003.

Appellant contends, as before, that the evidence in this case is so overwhelmingly against the position of Appellee that this Court should, as a *matter of law,*

reverse the construction of the Court below. Appellee, and the trial Court, can muster in their support only one item of evidence—the one portion of the insurance policy on which the number "20" appears as the term of the family income provision. In contrast, Appellant points to the remaining portions of the same policy, plus the correspondence between the contracting parties on the very provision in dispute, all of which show that a scrivener's error occurred and that the parties intended to contract for a 15 year term.

But it is not necessary to a decision for Appellant that this Court be able to reverse the trial Court's construction as a matter of law. For the restrictive rule of *Estate of Rule* has no application to the situation presented by this case. The situation in the *Rule* case was one involving conflicting and inconsistent oral evidence. The situation in the present case involves primarily documentary evidence, supplemented by the testimony of one witness, and all the documents and the testimony stand uncontradicted and mutually consistent. The rule of review properly applicable to such a case is given by *Estate of Platt*, 21 C. 2d 343. This case lists at page 352 three types of cases in which the construction of a contract given by the trial Court is treated merely as a decision of law, properly reviewable in an Appellate Court. Among these types is the case where there is no conflict in the evidence. The *Platt* case itself appears to belong to this type, and thus applies the rule it describes. And in *Moffatt v. Tight,* 44 C.A. 2d 643, 648, the Court observed as follows:

> The plaintiffs further contend that the issue being an interpretation of a written instrument the holding of the trial court must be accepted by this court. . . . But where, as here, there is no conflict in the evidence, the question presented is solely a question of law and a court of review is bound to determine it accordingly.

Similarly, in *United Artists Corp. v. Strand Productions,* 216 F. 2d 305 (9th Cir. 1954) the Court observed as follows (p. 310):

> And the case being one essentially for construction of language within the four corners of the instrument, the appellate court is free to interpret the contract without indulging presumptions as to the interpretation below. As logic, the conclusions are entitled to serious consideration, but the appellate court is not bound thereby.

The evidence in the present case, being mainly documentary, and being entirely uncontroverted, falls within the scope of the *Platt* rule. This Court should therefore render a construction of the contract that will give effect to the mutual intent of the contracting parties, as disclosed by the undisputed evidence of the case.

Appellee next relies on an assertion that in the process of construction, the policy must control over the application. For this proposition four cases have been cited by Appellee. But Appellee's own cases demonstrate that the law is not as she has contended. *Aetna Life Ins. Co. v. Phillips,* 69 F. 2d 901 and

Horning v. Lindsay, 169 F. 2d 963, cited on p. 11 of Appellee's brief, were cases in which the record contained no indication of the intent of the parties. No issue of mistake was raised. No proof of the meeting of the minds of the parties was made. No evidence as to the mutual intent of the contracting parties was presented. But these are not the circumstances of the present case.

It is surely the basic principle of all contract law that the Court should try to give effect to the intent of the parties. This is amply proved by Appellee's cases of *Metropolitan Life Ins. Co. v. Banion,* 106 F. 2d 561 and *Metropolitan Life Ins. Co. v. Whitler,* 172 F. 2d 631, cited on p. 6 of Appellee's brief. In these cases, evidence *was* available as to the mutual intent of the parties. The ultimate holding in these cases was that the terms as contained in the policy should prevail over the terms as contained in the application, *but the reason for this holding was that the former terms expressed the mutual intention of the parties,* as clearly shown by the evidence. This basic rule of contract law is further demonstrated by Appellant's case of *Castellina v. Vaughan,* 11 S.E. 2d 536 (W. Va.), where the terms of the application for insurance were held to prevail upon a finding that these terms, and not the terms of the policy, expressed the mutual intention of the contracting parties. Appellee's assertion that this case was decided upon the principle of construing the contract against the insurer (Brief, p. 11) is in utter disregard of the language of the opinion, and is rendered ridiculous by the fact that

the insurance company in that case was in the position of a mere stakeholder.

Appellee argues that the policy should be read as a layman would read it, and that her case is thereby established. (Brief, p. 11.) But such a devise is only a guide to the intent of the contracting parties. And the true intent of the contracting parties has been amply proved by the exchange of correspondence with the so-called layman concerning the insertion of a 15 year term. Nor is there any dispute that in ascertaining the intention of the parties, great weight should be given to the application for insurance. *Bass v. Occidental Life Ins. Co.,* 142 Pac. 798 (New Mexico); *Point v. Wills,* 97 P. 2d 374 (New Mexico). It is the duty of this Court to construe the contract before it in such a way as to give effect to the mutual intention of the contracting parties. The uncontradicted evidence clearly demonstrates that this intention was to provide for a 15 year term for the family income provision, and the contract, taken as a whole, should be held to so read.

B. In any event the judgment should be reversed to enable reformation of the contract.

The law of New Mexico on the subject of reformation, conceded by Appellee to be applicable (Brief, p. 15), is not open to dispute. The basic premise for the granting of this relief under New Mexico law is a finding that there was a prior agreement or meeting of the minds by the contracting parties which expressed their true desire. *Collier v. Sage,* 180 P. 2d 242; *Point v. Wills,* 97 P. 2d 374; *Franciscan Hotel*

Co. v. Albuquerque Hotel Co., 24 P. 2d 718; *Cleveland v. Bateman,* 158 Pac. 648; *First Natl. Bank v. Hartford Fire Ins. Co.,* 127 Pac. 1115. If this be shown, and the departure from the agreed-upon contract is caused by a scrivener's error, it matters not whether the error was mutual or unilateral. *Point v. Wills, supra.* Appellee's contention (Brief, p. 15) that this doctrine was rejected by the Court in *Point v. Wills* is completely unfounded. The Court refused to grant reformation, but the reason for doing so was that the doctrine set out above was held inapplicable to the facts of the case. It was held that no scrivener's error had in fact occurred. The vitality of the principle of law applicable to scrivener's errors was in no wise impaired.

Appellee again seeks refuge behind the ruling of the trial Court regarding the intention of the parties, and attempts to avoid the argument as follows (Brief, p. 15):

> Moreover, defendant's argument rests on the assumption that prior to the issuance of the written policy the parties had come to an agreement, and that is a false assumption, as already seen.

On the contrary, Appellant has conclusively established this agreement by uncontroverted documentary and testimonial evidence.

In any event, it is apparent that the insured must have known of the mistake. The only evidence on this issue is provided by the documents in the case. This documentary evidence shows that the premium for the original policy and the premium for the converted

policy were conspicuously displayed on the policies, in such a fashion that they could be seen without removing the policy from its envelope. The premium for a 20 year family income rider was thus displayed on the original policy, and the amount of that premium was $52.95. *This document was in the hands of the insured,* and the most cursory inspection would have disclosed to him this figure. The converted policy recited in the same manner, a family income premium of $43.20. There is an obvious one-quarter reduction in premium amount, which obviously would correspond to a one-quarter reduction in the length of the term—from 20 years to 15 years. It is probable that the insured never believed that the converted policy called for a 20 year term. But if he did notice the discrepancy in years, he could not help knowing that a mistake had been committed. The evidence on this issue is entirely documentary and is entirely uncontroverted. It is thus well within the province of the reviewing Court.

Appellee cites three cases to show that an argument based on premium rates should be rejected by this Court. (Brief, p. 15.) But two important distinctions make those cases inapplicable to the present case. The object in all three of the cited cases was the reformation of the premium amount, and the insurer's case consisted merely of proof that an incorrect amount had been charged. Secondly, there was no contention or proof made with regard to mutual intent of the contracting parties. In the present case, the item to be reformed is the term of years, and Appel-

lant has conclusively proved the mutual intention of insurer and insured. In addition, the insured had before him in black and white, in a conspicuous position, the premium amount that properly corresponded to the 20 year term.

Appellee finally contends that as a proposed witness of the insurance company was not called to testify, and no explanation thereof was given, this should constitute adverse evidence "of the most convincing character." (Brief, p. 14.) This bold assertion overlooks the fact that an explanation was given (R. 155-157), that the witness in fact called was the person in charge of the processing of this application (R. 157-158, 161-162), and that no manner has been suggested in which the proposed witness might have added anything of significance to the testimony of the person who actually processed this application.

Appellant has conclusively established all essential facts necessary to entitle it to reformation, both under the law of New Mexico and under the law which Appellee asserts applies everywhere else.

V. APPELLEE SEEKS TO INJECT AN ILLUSORY OFFER AND ACCEPTANCE THEORY INTO THE CASE.

Appellee has given a legalistic description of the contract in the present case, in which she describes the applications of the insured as offers and the issuance of the policy as a counteroffer. The case of *Metropolitan Life Ins. Co. v. Whitler*, 172 F. 2d 631, is cited in an attempt to show that such an analysis

should control the disposition of this case. (Brief, p. 6.) Quite the contrary, however, Appellee's own case demonstrates that such labels as "counteroffer" do not control the result of a case like the present one. The crucial finding in the *Whitler* case was that both contracting parties *intended* to name the beneficiary as set forth in the second of two documents; that there was a meeting of the minds on the identity of that named person. Without this basic finding as to mutual intent, any talk of offer or counteroffer is meaningless. And in the present case, it has already been demonstrated that the intention of the parties called for a 15 year term.

Nor is there any need to fix the precise moment at which a contract was established in order to apply the doctrine of reformation. For as conceded by Appellee, reformation does not require a prior and independent enforceable contract. (Brief, p. 4.) Indeed, the New Mexico case of *Franciscan Hotel Co. v. Albuquerque Hotel Co., supra,* explicitly so holds. The test for reformation, as for construction, is rather whether there was an agreed or mutual intent.

VI. APPELLEE FAILS TO ESTABLISH AN ALLEGED RATIFICATION.

Appellee also talks much of ratification, pointing out the endorsement by the company subsequent to the mistake, as if that disposed of the problems of construction and/or reformation. Of course, it cannot do so. For actual or imputed knowledge of the true

situation is an essential element for any ratification to be legally effective, as is illustrated by Appellee's own authorities. (Brief, pp. 9-10.)

The trial Court made a finding that the insurance company did have knowledge of the mistake (Findings Nos. 10, 12), and presumably this finding was based on the principle of constructive knowledge. But this finding must be reversed, inasmuch as it was produced by the application of an incorrect theory of law respecting constructive knowledge. There is no dispute about the applicable rule of review in such cases. Findings of fact that are based on an incorrect theory of law or that are induced by an error of the law must be reversed on appeal. *U. S. v. United States Gypsum Co.,* 333 U.S. 364, 68 S. Ct. 525; *Smallfield v. Home Ins. Co. of N. Y.,* 244 F. 2d 337, 341 (9th Cir. 1957).

The error inextricably bound up in this finding is demonstrated in Appellant's Opening Brief, pp. 25-31. The trial Court relied on the proposition that the means of knowledge are the equivalent of knowledge. Possession of the insurance policy was therefore equated with knowledge of its contents. But in fact, the above proposition is not a complete statement of the law. Availability of the policy has no significance whatever unless there were circumstances which would compel a reasonable man to make an investigation. That this is the law can be ascertained from the very authority on which the trial Court relied. Nor does the authority cited by Appellee at page 10 of her brief in any way alter this legal principle. *Palmquist v.*

Mercer, 43 C. 2d 92, was a negligence action arising out of the hire of a horse, and is in no way applicable to the facts of the present case. *Hayes v. Travelers Ins. Co.,* 93 F. 2d 568, was an insurance case in which it was found that there was no scrivener's error or other mistake in drafting, but rather that the policy exactly expressed the mutual intent of the insured and the insurance agent. *Fidelity & Guaranty Fire Corporation v. Bilquist,* 108 F. 2d 713, from which Appellee quotes at length, contains the following statement at page 716:

> The means of knowledge are the equivalent to knowledge. *A clue to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to a discovery.* (Emphasis added.)

This is precisely the proposition for which Appellant is contending. Since the finding of fact resulted from this error of law, the finding of constructive knowledge must be reversed.

Appellee at one point complains that she was not notified sooner of the discrepancy between the bargain and the written policy. She seems to assume that the insurance company had actual knowledge of the mistake, and had neglected to advise her of it. This amounts to a presumption of bad faith. But such an assumption is contrary to all the evidence of the case, and is completely unwarranted. Indeed, the presumption is just the other way around, and no evidence was introduced which in any way rebutted this presumption of good faith and fair dealing. California Code of Civil Procedure, § 1963(19); *Stafford-Lewis v.*

Wain, 128 C.A. 2d 614, 621; *Hedden v. Waldeck,* 9 C. 2d 631, 636; *Michaels v. Pacific Soft Water Laundry,* 104 C.A. 366. In the latter case, the Court stated as follows (p. 368):

> The presumption against fraud, . . . the presumption that private transactions have been fair and regular, and the presumption that the ordinary course of business has been followed (sec. 1963, subds. 1, 19 and 20, Code Civ. Proc.) are all *evidence* of good faith of the bank in this particular, and a contrary finding cannot stand without some evidence rebutting them.

As a matter of law, fairness and regularity and good faith must be held to be established by Appellant in the present case. The insurance company did not notify Appellee any sooner of the discrepancy for the simple reason that it learned of the discrepancy for the first time when Appellee sought her windfall payments.

Thus, Appellant had neither actual nor constuctive knowledge of the discrepancy between the intended bargain and the portion of the policy relied upon by Appellee. Any discussion of ratification thereby becomes academic. The mere repetition of an ambiguity or an error does not by some magic cause the ambiguity or error to disappear. Any finding of the trial Court based on ratification or on the company's knowledge of the mistake is clearly contrary to the law and the evidence and must be reversed.

VII. APPELLEE VAINLY ATTEMPTS TO BRING THIS SUIT WITHIN THE INCONTESTABILITY CLAUSE OF THE POLICY.

Another argument advanced by Appellee is based on the incontestability clause of the insurance policy. *Appellee makes no contention that this clause should bar construction of the contract,* but does assert that it should bar reformation of a mistake. In support of her theory, she has cited one case, *Richardson v. Travelers Insurance Co.,* 171 F. 2d 699 (9th Cir.) But this case stands alone among a host of authority that declares that a suit for reformation for mutual mistake is not a contest within the meaning of the incontestability clause.

The inherent justice of the rule is apparent when one examines the leading case of *Columbian Natl. Life Ins. Co. v. Black,* 35 F. 2d 571 (10th Cir., 1929). In that case, the insured applied for an ordinary life policy. He paid premiums on an ordinary life policy. But the company mistakenly attached a second page to the policy, which second page provided for an endowment payment. At the end of twenty years, the insured sought to enforce payment of an endowment. The company, of course, asked for a reformation. The insured interposed pleas of no mutual mistake, acquiescence, negligence, laches, and the incontestability clause. The Court rejected all of these defenses, and at page 547 was quick to point out that the insured was entitled to no more than he had truly contracted and paid for, saying:

> He [the applicant] applied for an ordinary life policy; without any quibble, and in response to

> his application, he received a policy that manifestly was in error. He only paid for an ordinary life policy.

And, in rejecting the asserted defense of the incontestability clause, the Court said at page 577:

> Both the policy applied for and the one issued provide, in substance, that "after one year from date hereof this policy shall become incontestable," save for non-payment of premiums. It is claimed that this provision bars this action [for reformation]. The contention is not sound. This is not a contest of the policy, but a prayer to make a written instrument speak the real agreement of the parties.

The incontestability clause is not intended to foist a contract or a liability upon the parties which they never intended to create. Instead, it is intended to assure the policyholder that the liability and contract which was *actually intended* will not be avoided or invalidated after the passage of a given period of time. The *Richardson* case relied on by Appellee has never been followed. It has been severely criticized. It has been referred to unfavorably in a subsequent California Supreme Court decision. And, in any event, the case construes contractual language clearly distinguishable from that in our case—a peculiar distinction which the Court in that case felt made the mass of contrary authority inapplicable.

That the *Richardson* case stands alone can be readily established by examining 45 *CJS,* Insurance, § 751, p. 769; 29 *Am. Jur.,* Insurance § 892; 7 ALR 2d 504;

1 *Appleman, Insurance Law and Practice,* § 337, p. 402, and the law review articles which comment upon it. That its reasoning is wholly inconsistent with the purpose and policy of incontestability clauses can be ascertained from reading the excellent criticisms of the case found, for example, in 62 *Harv. L. Rev.* 890, 97 *U. Pa. L. Rev.* 741, 33 *Minn. L. Rev.* 784, and 27 *Tex. L. Rev.* 861. The assurance that the case does not represent good California law will be found in the discussion of the California Supreme Court in *New York Life Ins. Co. v. Hollendar,* 38 C. 2d 73, 83. And the distinction between the language of the clause in the *Richardson* case and that in ours can be readily ascertained by reading the decision itself. In our case, the clause declares that the "policy" shall be incontestable. In the *Richardson* case, the clause stated that "*this contract* shall be incontestable." And the *Richardson* opinion placed particular emphasis on this phrase in holding the universal rule inapplicable. It felt that the broader phrase, "*this contract,*" precluded any inquiry beyond the written policy itself. We do not agree with this reasoning nor do the writers who have exhaustively analyzed the decision, for the policy is only *evidence* of the contract (9 *Wigmore, Evidence,* § 2417.) Thus an attempt to show the true contract is not a contest of it, but simply the establishing of the essential agreement itself. Both construction and reformation are processes designed for enforcing a contract, not contesting it.

VIII. THE TRIAL COURT CLEARLY ERRED IN DENYING THE RELIEF AVAILABLE TO THE INSURANCE COMPANY BY INVOKING THE STATUTE OF LIMITATIONS.

Appellee asks the Court to ignore all substantive issues of this case because of the bar of the statute of limitations. *Of course the statute of limitations cannot bar relief by way of construction of the contract, and Appellee does not so contend.* The Court has an obligation to construe the contract whenever an action is brought on the contract. The power and obligation to construe are contemporaneous with the contract itself. Nor does the statute of limitations bar relief on the grounds of mistake when this mistake is asserted as a defense to an action, as in the present case. *Bank of America v. Vannini,* 140 C.A. 2d 120; *Gardner v. California Guaranty, etc. Co.,* 137 Cal. 71. This latter case involved a suit for reformation of a contract on the grounds of mistake. The Court observed as follows (p. 75):

> The objections on the score of the statute of limitations are equally untenable. Under the provisions of the codes, the contract really agreed upon is regarded as the only contract between the parties, and this is to be interpreted according to their real intention as proven; nor is it necessary that it should be formally revised. . . . Hence, while the contract remains in force, and not barred by the statute, there can be no bar to the proof of the real intention of the parties or to the reformation of the contract.

But in any event, it is conceded that the applicable statute of limitations will bar nothing unless there has

been "discovery" of the mistake by the insurance company. The trial Court made such a finding (Findings Nos. 10, 12), and Appellee again relies on this finding as tieing the hands of the reviewing Court. In fact, however, this finding is a nullity, inasmuch as it proceeded from a misconception of the applicable law. Where, as here, a finding of fact is induced by an error of law, the reviewing Court must reverse the trial judge. See discussion and cases cited supra at pp. 30-32. For a demonstration of the error of law committed by the trial Court in making this finding, see Appellant's Opening Brief, pp. 25-31. The statute of limitations therefore does not stand in the way of this Court to give effect to the actual bargain made by the contracting parties.

IX. THE DECISION BELOW IS INCONSISTENT WITH THE TREATMENT GIVEN TO AN ALMOST IDENTICAL CASE BY A CALIFORNIA DISTRICT COURT IN A RECENT AND CAREFULLY CONSIDERED DECISION.

All of the points heretofore made by Appellant are confirmed by the recent case of *Flax v. Prudential Life Insurance Co. of America,* 148 F. Supp. 720 (S.D. Cal., Central Div., 1957). A brief survey of the facts, issues and holdings of that case will be presented here, although indeed the case is so close to the case at bar as to warrant a close reading of the entire opinion.[1]

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[1]See also *Mutual Life Insurance Co. of N.Y. v. Simon,* discussed in Appellant's Opening Brief at pp. 21-22, 30.

The *Flax* case involved a suit to recover money under a life insurance contract, with a counterclaim by the insurance company for reformation on the grounds of mutual mistake. The original policy was converted into a paid-up policy in 1936, at which time an endorsement or rider was attached to the policy showing the cash surrender value of the policy on various dates. The rider recited that these figures represented cash surrender value per thousand dollars of insurance. Actually the figures shown represented the total cash surrender value of the entire policy, and the incorrect description was the result of a scrivener's mistake. The company did not learn of the mistake until 1954, when it was processing a loan applied for by the insured. The insured opposed reformation on the grounds of an incontestability clause, the statute of limitations, and the law applicable to reformation and mutual intent in general.

The Court first held that the incontestability clause had no application to a suit for reformation. (p. 725.)

> New York courts have held uniformly that incontestability clauses of the type inserted in this policy *do not* prevent a contest of the policy on the ground of fraud or mistake. . . . They take the view that when, either through mutual mistake or unilateral mistake by one party which is known to the other, the policy does not express the intention of the parties, reformation may be had either when an action is instituted by the insured to enforce its provisions or in a direct action brought by the insurer to make the policy speak verity.

The *Richardson* case, relied on by Appellee in the present case to reach a contrary result, was disposed of as follows (p. 726, fn. 6):

> Richardson v. Travelers Ins. Co., 9 Cir., 1948, 171 F. 2d 699, 7 A.L.R. 2d 501, does not command a different conclusion. There, the federal court was interpreting a California policy, and, finding no California precedent, it held that the incontestability clause prevented reformation. The effect of this decision has been limited, if not entirely destroyed, by the decision of the Supreme Court of California in New York Life Ins. Co. v. Hollender, 1951, 38 Cal. 2d 73, 237 P. 2d 510, which must control us in interpreting California contractual law.

The Court in the *Flax* case was equally unimpressed with arguments based on the California statute of limitations. The Court suggests that one reason the *statute of limitations does not* apply is because of the defensive nature of the counterclaim for reformation of a mistake. (p. 726, fn. 8.) But in any event, it was held that there can be no bar to showing or *interpreting the true meaning of a contract,* as an incidental and preliminary step to enforcing the contract, so long as the contract itself is not barred (p. 727):

> And it is a cardinal rule of federal equity jurisprudence that where it is sought to enforce a provision in a contract which was the result of remediable mistake, the mistake need not be asserted until action is sought on the instrument in which the mistake occurred. This, because the right to reform an instrument is co-existent with

> the contract. So long as the contract is enforceable, the party against whom it is sought to enforce has the right to plead mistake and seek an interpretation of the instrument which would eliminate the clause inserted by mistake. This upon the ground that reformation is merely incidental to the ultimate relief sought.

Note that this is only one of the numerous grounds available to Appellant in the present case for avoiding the statute of limitations obstacle thrown up by plaintiff.

The *Flax* case discusses the principles of reformation and mutual intent relevant to this type of situation. It carefully distinguishes between a mistake of fact in the agreement and a mistake of a scrivener in reducing a valid agreement to writing. Numerous authorities are cited to show the Court's power to make the instrument speak the way the contracting parties mutually intended that it should, either by a decree of reformation or by enforcing the contract according to its true purpose and intent. Plaintiff in that case, as in the present case, had made an attempt to impute knowledge to the insurer. The Court observed that the policy was in the *exclusive possession of the insured, save for a few occasions* on which it had been sent back to the insurer for special purposes. *Mere possession by the insurer on these occasions was held not to constitute actual or constructive knowledge of the mistake,* nor to impose a duty on the insurer to investigate for a mistake. (p. 730.) The Court then summarized as follows (p. 730):

> The plaintiff either did or did not know of the mistake. *If he did,* it appearing that the mistake *was not known* to the insurer, we have the type of unilateral mistake for which relief by way of reformation is granted. *If he did not know* the mistake, we have a case of mutual mistake for which reformation also lies.

Thus the fact that neither party in the present case noticed the mistake is not, as contended by Appellee, any impediment to reformation or construction. Rather, it is the very situation for which these remedies were designed.

The Court in the *Flax* case concluded with these observations (p. 731):

> So, if plaintiff's present demands were allowed, he would receive something which he did not bargain or pay for,—something for nothing. . . . It would be neither good morals nor good law to sanction the application of such a policy to business relations.
>
> On the other hand, a ruling for the defendant avoids a palpable injustice and still allows the plaintiff the full benefit of the contract *he and the company intended* to make.

These observations apply with equal force to the present case. Appellee's husband, the insured, did not intend, bargain, or pay for this extra period of payments which Appellee is now seeking. No prejudice can result to Appellee from enforcing the *true* contract. And by enforcing this true, bargained for, and intended contract, the Court can avoid the injustice of giving Appellee a windfall at defendant's expense.

CONCLUSION.

For the reasons stated, it is therefore respectfully submitted that the judgment of the District Court in favor of plaintiff should be reversed and plaintiff's complaint dismissed. Alternatively, the judgment of the District Court dismissing defendant's counterclaim for reformation should be reversed, and reformation granted. At the very least, that portion of the judgment of the District Court which gave plaintiff recovery for future installments of money, not yet due and owing, should be reversed, and in any event remanded for commutation.

Dated, San Francisco, California,
February 5, 1958.

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